JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1163

VIRGO CORPORATION, *Petitioner*

v.

RALPH M. PAIEWONSKY, Governor, MORRIS F. DE-CASTRO, ALBERT PRENDERGAST, PERCY DEJONGH, RUBEN WHEATLEY, MAHLEN LINDQUIST, ADOLPH POTTER, JOSEPH ALEXANDER, PERCY GARDINE, and the GOVERNMENT OF THE VIRGIN ISLANDS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Virgo Corporation petitions for a writ of certiorari to review two judgments of the Court of Appeals for the Third Circuit entered in this case on September 29, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 1a-29a) is reported at 384 F.2d 569. The first opinion of the District Court for the Virgin Islands (Appendix D, *infra,* pp. 35a-46a) is reported at 251 F. Supp. 279, and the second opinion of the District Court of the Virgin Islands (Appendix E, *infra,* pp. 47a-64a) is reported at 254 F. Supp. 405. A third opinion of the District Court on the tax exemption issue only (Appendix F, *infra,* pp. 65a-69a) is reported at 259 F. Supp. 26.

JURISDICTION

The judgments of the Circuit Court of Appeals entered on September 29, 1967, are reproduced in Appendix B, *infra,* pp. 30a-32a, and the order denying rehearing entered on November 7, 1967, is reproduced in Appendix C, *infra,* pp. 33a-34a. Mr. Justice Brennan, in an order entered on January 24, 1968, extended the time for filing a petition for writ of certiorari to and including February 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In 1965 the Government of the Virgin Islands enacted discriminatory tax legislation for the acknowledged purpose of limiting the number of watches shipped to the continental United States in order to discourage enactment by Congress of pending legislation to regulate such exports. For the same reason, the Governor of the Virgin Islands denied Virgo Corporation, a local watch manufacturer, a statutory tax exemption, although the same exemption was

granted to four competing watch manufacturers. The questions presented are:

1. Whether the Government of the Virgin Islands has the power to regulate the export of goods to the continental United States.

2. Whether the Court of Appeals erred in ruling that a tax prohibiting the export of watches from the Virgin Islands to the United States did not constitute an undue burden on commerce because the manufacture of watches is not a part of commerce.

3. Whether the Governor of the Virgin Islands, in making administrative decisions, may disregard applicable statutory criteria and base such decisions on a personal desire to discourage Congressional legislation of which he disapproves.

STATUTES INVOLVED

The statutes involved are printed in Appendix H, *infra,* pp. 78a-87a.

STATEMENT

This petition by Virgo Corporation ("Virgo") seeks to review an opinion by the Court of Appeals for the Third Circuit reversing two judgments entered by the District Court of the Virgin Islands invalidating (1) the Watch Production Quota Act of 1965, as originally enacted and as amended (33 V.I.C. §§ 511-518), which imposed a discriminatory taxing system to limit the quantity of watches shipped from the Virgin Islands to the United States, and (2) the action of the Governor of the Virgin Islands denying Virgo a tax exemption under the Virgin Islands Industrial Incentive Act (33 V.I.C. § 4001 *et seq.*).

1. Legislative Background

Beginning in 1959 a burgeoning watch industry developed in the Virgin Islands solely on the basis of a duty-free tariff concession granted by Congress to the territories for articles produced in the territories whose foreign-origin components do not comprise more than 50 per cent of their total value.[1] The watch operations consist primarily of assembling parts imported from Europe and Japan (CA 123b)[2]; virtually all (over 97%) of the completed watches are then shipped to and sold in the United States. (See App. 62a) Watch shipments to the United States from the Virgin Islands increased from 4,900 units in 1959 to more than 2,400,000 in 1964 and to over 3,500,000 units in 1965. (CA 117b) By 1966, there were 16 companies producing watches in the Virgin Islands. (CA 116b)

As a consequence of this rapid increase in watch shipments to the United States, watch manufacturers in this country began urging Congress to terminate or limit the duty-free entry of watches from the Virgin Islands, and legislation to this end was introduced in Congress. (CA 82b-86b) Concerned by this development, the Governor of the Virgin Islands in 1965 appointed a special committee to study the watch situation. (CA 91b) This committee recommended that the Virgin Islands set up a quota system to limit the number of watches produced by each manufacturer for shipment to the United States. (CA 91b-98b) It sug-

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[1] See 19 U.S.C. § 1202, headnote 3(a).

[2] "CA" refers to the two appendices filed with the briefs in the Court of Appeals in case No. 16,116. Pagination with a capital "A" (CA A-14) indicates Appellants' Appendix, and pagination with a small "b" (CA 14b) indicates Appellee's Appendix.

gested that the quota system be enforced by imposing a $2.50 production tax on each watch shipped to the United States in excess of the established quotas. (*Ibid.*)

In August, 1965, the Territorial Legislature of the Virgin Islands enacted the committee's recommendations almost verbatim as the Watch Production Quota Act. (33 V.I.C. §§ 511-518, reproduced at App. 50a-60a) Under this statute a quota system was established for watches manufactured in the Virgin Islands for export to the United States.[3] A $2.50 tax was imposed on each watch shipped to the United States in excess of the fixed quotas, whereas only a 3¢ tax was imposed on all other watches sold either in the Virgin Islands, in foreign countries, or in the United States within the quota system. (33 V.I.C. § 511)

2. The District Court Proceedings

Virgo, a Virgin Islands corporation affiliated with the United States Time Corporation, one of the leading watch producers in the United States, commenced watch manufacturing operations in the Virgin Islands in 1963. (CA 5b) As a result of the pressures exerted by the mainland watch industry upon the Government of the Virgin Islands, Virgo soon encountered considerable difficulty, first because the Governor failed to grant it a reasonable quota under the Watch Production Quota Act, and second, because the Governor, after long delay, denied it a tax exemption under the

[3] Section 512 established a quota of 1,800,000 watches for export to the customs area of the United States during the initial six-month period. (33 V.I.C. § 512) For subsequent twelve-month periods, the Governor was directed to fix the quota at 1/9th of "the total consumption of watches of all kinds in the customs area of the United States . . . ." (33 V.I.C. § 513(a))

Industrial Incentive Program, although Virgo had met all of the statutory requirements for the tax exemption and other similarly situated competing watch manufacturers had been granted the tax exemption.

On November 18, 1965, Virgo filed a complaint challenging the legality of the Watch Production Quota Act and the Governor's action denying it a tax exemption under the Industrial Incentive Program. (CA 1b) The District Court, after appropriate hearing, held the Act to be invalid on the ground that it imposed an export duty in violation of Section 36 of the Organic Act of 1936, as revised. (App. D)[4] (Section 36 provides that "no new export duties shall be levied in the Virgin Islands except by the Congress.") (App. 87a)

On the same day that the District Court handed down its decision, the Territorial Legislature of the Virgin Islands enacted an amended Watch Production Quota Act[5] which both courts below found contained "no changes from the original Act which were of legal significance in respect of the issues of validity in these appeals." (App. 6a-7a) The effect of the amended Act was still to impose a prohibitory $2.50

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[4] The District Court found "that the primary purpose of the Act was to limit the exportation of watches from the Virgin Islands to the 'Customs area of the United States,' to forestall the necessity of the Congress taking away the tariff concessions which the Virgin Islands watch manufacturers enjoyed. There can be no other interpretation of the Watch Production Quota Act than it being an export duty upon watches entering the 'customs area of the United States.' Such an export duty can only be levied by Congress." (App. 41a)

[5] The Amended Act fixed the annual overall quota at 1/9th of the watch consumption of the United States. (See App. 56a-60a)

tax on watches sold in the United States in excess of the quota system.

Virgo immediately brought a second suit in the District Court challenging the legality of the amended Act. (App. 47a) The District Court again held that the amended statute continued the export duty in violation of Section 36 of the Organic Act of 1936. (App. 60a-64a)

On the tax exemption issue, the District Court, in its first opinion, concluded that the case should be remanded to the Virgin Islands Industrial Incentive Board with directions that appropriate steps be taken to determine whether Virgo was entitled to the same tax exemption accorded competing watch companies. (App. 46a) However, neither the Board nor the Governor acted within the times fixed by the District Court, so the Court, on June 20, 1966, again ordered them to act. (CAE 4b)[6] On July 11, 1966, the Board found that Virgo met all the statutory requirements for the tax exemption and recommended to the Governor that Virgo be granted the exemption. (CAE 34b-35b) The Governor, however, notified Virgo that he disapproved the recommendation of the Board "for the reason that the corporation [Virgo], as evidenced by its substantial profit return, does not require the stimulus of governmental assistance as provided for by the law." (CAE 37b)

On October 10, 1966, the District Court held that Virgo's "substantial profit return" was not a statutory

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[6] "CAE" refers to the two appendices filed with the briefs in the Court of Appeals in case No. 16,374. Pagination with a capital "A" (CAE A-14) indicates Appellants' Appendix, and pagination with a small "b" (CAE 14b) indicates Appellee's Appendix.

basis for denying the tax exemption, and again remanded the case to the Governor to act in accordance with the statutory criteria. (App. 65a-69a) Once again, the Governor notified the District Court that he was denying Virgo the tax exemption solely because of "its substantial profit return." (CAE 79a) Thereupon, the District Court, on November 7, 1966, ordered the Governor to grant the tax exemption to Virgo. (CA 82a)

Thereafter, on November 10, 1966, Congress, acting under its plenary powers over the territories, enacted Public Law 89-805 which provided an annual quota for watches entering the United States duty-free from *all* the territories equal to 1/9th of the United States watch consumption for the preceding year. (CA 127b-131b) Congress allocated this quota among the Virgin Islands, Guam and American Samoa, and provided for its joint administration by the Departments of Commerce and Interior. (*Ibid.*)

3. The Court of Appeals Decision

On appeal, the Third Circuit reversed both judgments of the District Court. (App. 1a) On the question of the validity of the Watch Production Quota Act, as amended, the court below ruled "that the legislative power of the Virgin Islands Legislature is not limited by the provisions of section 36 of the Organic Act of 1936" because "the revised Organic Act of 1954 operated to repeal the Organic Act of 1936." (App. 12a) The court admitted "that the revised Organic Act did not expressly repeal the Act of 1936" (App. 11a), but it concluded that there was "repeal by implication." (App. 10a)

Furthermore, the court held that the tax imposed by the Watch Production Quota Act and its amendment was not "an export duty" but "essentially an excise tax levied on the production of watches in the Virgin Islands, a process local in nature and complete in itself." (App. 15a) In reaching this conclusion, the court brushed aside the contention that the tax act's "purpose and effect were solely to curtail the shipments to the United States of watches produced in the Virgin Islands." (App. 19a) According to the court below:

> [A]ll that the statute did in mandatory terms was to impose a tax upon the local production of watches at two rates, a low rate upon watches produced within the limited quotas fixed under the Act (and in the original Act on two other minor categories) and a high rate on watches produced in excess of these amounts. While, as we have seen, the Legislature undoubtedly hoped that the imposition of the tax would discourage manufacturers from producing for future shipment to the United States more watches than the quota amounts, it did not actually forbid such production or shipment which all manufacturers remained free to engage in if they chose to do so. (App. 20a-21a)

Characterizing the regulatory purpose and effect of the tax act as "collateral," the court concluded that the discriminatory tax rates were not "so palpably arbitrary and unreasonable as to amount to a denial of due process of law." (App. 21a-22a)

The court, relying on *United States* v. *E. C. Knight Co.*, 156 U.S. 1 (1895), further decided that the watch quota tax did not constitute a burden upon interstate

commerce on the premise that "commerce follows after manufacture and is not a part of it." (App. 22a)[7]

In disposing of the tax exemption issue, the court below acknowledged that the record showed that Virgo had "fully met the objective criteria required of applicants by the Act" (App. 27a), but it held that the Governor nevertheless could deny the exemption where, in his opinion, the applicant's business does not require the stimulus of such governmental assistance. (App. 27a-28a) The fact that "four similarly situated competitors" of Virgo had been granted the exemption, the court said, did not constitute a denial of equal protection of the laws in violation of the bill of rights contained in section 3 of the revised Organic Act, 48 U.S.C. § 1561. (App. 28a-29a)

REASONS FOR GRANTING THE WRIT

Over twelve years ago, in *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955), this Court reviewed the legislative authority of the Virgin Islands under the 1936 Organic Act and said that Congress did not intend " to give the Virgin Islands Legislative Assembly power to do what no State has ever attempted." (*Id.* at 16) The decision below, in conflict with *Granville-Smith,* holds that the Virgin Islands' taxing and regulatory powers over commerce with the States exceeds those which the States may exercise under the Constitution. Furthermore, the decision conflicts with leading precedents of this Court interpreting the Commerce Clause. This case, therefore, raises questions

[7] In addition, the court below passed on and "rejected" Virgo's claim that the Governor improperly allocated quotas among the watch manufacturers, even though the District Court had neither tried nor decided the disputed facts involved in this claim. (App. 23a-24a)

of fundamental importance regarding the powers of the territories to tax and regulate the free flow of commerce to the continental United States.

The enactment of P.L. 89-805, whereby Congress now regulates the quantity of watches shipped from the territories to the United States, in no way lessens the importance of these questions. For the issue here is whether a territorial government itself has the power to regulate this flow of commerce. Indeed, the Virgin Islands continues to regulate and tax the flow of wool products to the United States under a production quota tax statute virtually identical to the Watch Production Quota Act. (See 33 V.I.C. §§ 501-508)

The decision below also raises the important question of whether the territorial governments may make administrative decisions on grounds not provided for by applicable statutes in order to discourage the enactment by Congress of legislation which they disapprove. In light of the manifest importance of the questions presented, as well as the future impact of the decision, review by this Court is clearly warranted.

I.

Section 36 of the Organic Act of 1936 (48 U.S.C. § 1406i) expressly prohibits the Government of the Virgin Islands from imposing any new export duties on goods shipped to the United States or elsewhere. Specifically, the section provides "[t]hat no new export duty shall be levied in the Virgin Islands except by the Congress."

Incredibly, the court below upholds the quota tax on the proposition that it is an "excise" tax rather than an "export" tax, because it was levied on the production of watches, "a process local in nature

and complete in itself," and "not upon their transmission out of the Virgin Islands." (App. 15a) In the words of the court: "The controlling fact is that the tax is attached while the watches were in the process of their manufacture and before their sale and possible export. It follows that the taxes imposed under the Watch Production Act were not export duties." (App. 17a)

This reasoning process falsely elevates form above substance and conflicts with the settled precedents of this Court that the constitutionality of a state taxing law is determined by "the ultimate effect of the law as applied and enforced by a State." *American Oil Co.* v. *Neill,* 380 U.S. 451, 455 (1965). As this Court stated in that case: "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form." (*Ibid.*)[8]

Here there has never been any question about the purpose or practical effect of the watch quota tax imposed by the Virgin Islands. As admitted by the Study Committee and the Governor (CA 80b-98b),[9] and freely acknowledged in testimony before Congress

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[8] For additional authorities on this point, see the decisions of this Court discussed in the District Court's second opinion at App. 61a-62a.

[9] See also the testimony of Study Committee members Feldman (CA 52b-53b), deCastro (CA 67b-68b), Prendergast (CA 73b) and the letter of Committee member Kirwin, who wrote, on the day the Committee Report was issued, "that the Virgin Islands Governor is presently working . . . to arrange for local legislation which would allow him to fix, in result though not in form, an ironclad (figuratively speaking) quota on watch shipments from the Virgin Islands." (CA 99b-100b)

(CA 113b-124b),[10] the specific purpose and effect of the quota tax was to limit watch shipments to the United States. To accomplish this result the statute imposed a two-level tax system, with a $2.50 rate on watches shipped to the United States in excess of fixed quotas and a 3¢ rate on all other watches, whether sold in the Virgin Islands or elsewhere. The higher rate was deliberately set at a level which made it economically unprofitable to assemble watches in the Virgin Islands for trans-shipment to the United States. (CA 116b-120b) The direct effect of the quota law, therefore, was to prevent all watch shipments to the United States in excess of the established quotas. (See the District Court's findings, App. 38a-41a)

In view of these undisputed facts, for the court below even to suggest that the statute "did not actually forbid" the production or shipment of watches in excess of the quotas, and that "all manufacturers remain free to engage in [such productions and shipments] if they chose to do so" (App. 21a), ignores the prac-

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[10] See Governor Paiewonsky's testimony before the Senate Finance Committee. (CA 116b-120b) In its Report, the Senate Finance Committee, referring to the watch quota tax legislation, said: "In an effort to control the watch assembly operations and to forestall congressional legislation . . ., the Virgin Islands Legislature, on August 30, 1965, enacted legislation . . . designed to limit watch assembly there for export to the United States to a quantity roughly equivalent to one-ninth of total apparent U.S. watch consumption for the preceding year." Senate Rep. No. 1679, 89th Cong., 2d Sess. 5 (1966)

See also the Report of the House Ways and Means Committee (CA 124b) and respondents' own admission that "the Governor's Committee recommended that the shipment of watches to the United States be controlled by a system of quotas on the local producers" and that the quota act "imposed" the $2.50 tax only on watches "to be exported to the United States" in excess of the fixed quotas. (CA 28b-29b)

tical realities of the situation. The "excise" label cannot save an otherwise invalid tax.

If the reasoning of the court below is accepted, then any territory, or even a state or local government, could control the movement of goods out of a territory or state by simply imposing a discriminatory tax on production or some other incident prior to shipment outside the territory or state. But, of course, this Court has never permitted such artificial distinctions to govern in determining the validity of taxing laws.[11]

II.

It is well-settled constitutional doctrine that a discriminatory taxing scheme which impedes the free flow of commerce among the states is invalid if it places an undue burden upon interstate commerce. See, *e.g.*, *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389 (1952); *Nippert* v. *Richmond*, 327 U.S. 416 (1946). Indeed, this Court has held that a state may not engage in taxation or regulation which discriminates against interstate commerce even when the state purportedly acts under its police powers and seeks to protect local business such as milk producers. Thus, in *Hood* v. *DuMond*, 336 U.S. 525 (1949), this Court, after tracing its long record of condemning economic restraints on interstate commerce for local economic advantage, stated that a state's "lack of power to retard, burden or constrict the flow of such commerce for their economic advantage is one deeply rooted in both our history and our law." (*Id.* at 533)

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[11] Unlike *Toyota* v. *Territory of Hawaii*, 226 U.S. 184 (1912), relied upon by the court below (App. 22a), there is, in the instant case, no basis for the two-level classification of the quota tax except to place an arbitrary limit on the number of watches shipped to the United States.

This Court has made it clear that the constitutional proscription against discriminatory taxation which acts as an undue burden on interstate commerce is applicable to the territories as well as the States. *Mullaney* v. *Anderson,* 342 U.S. 415 (1952). In that case, an Alaskan statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50 on non-residents and only $5 on resident fishermen was held void as an undue burden on interstate commerce. This Court rejected the argument that the constitutional limitation on placing undue burdens on interstate commerce was not applicable to the territories, stating: "Only the clearest expression of Congressional intent could induce such a result." (342 U.S. at 420) This Court, therefore, upheld the Court of Appeals decision where, as here, it had been argued that the taxable event (*i.e.,* the taking of fish) occurred before the goods had entered the flow of commerce. "It is true," the Court of Appeals said, "that the taking of the fish is a local incident, but if the tax in its practical operation has a discriminatory impact upon some aspect of interstate commerce, the local tax cannot be sustained by simply tying it to a local incident." (191 F.2d 123, 129)

The court below, however, held that the quota tax did not constitute an undue burden on commerce because, it reasoned, the tax was imposed "on the production of watches within the Virgin Islands, a process essentially local in character and complete in itself." (App. 22a) To reach this result, the Court, resurrecting the *E. C. Knight* decision, held:

> It is settled that commerce follows after manufacture and is not a part of it. *United States* v. *E. C. Knight Co.,* 1895, 156 U.S. 1, 12. In other words, commerce does not begin until after manu-

facture is finished, and hence the commerce clause does not prevent a state from exercising exclusive control over the manufacture. (App. 22a)

The court below erred in relying upon such outmoded concepts of interstate commerce. Surely it can no longer be contended that manufacturing is not part of commerce. See, *e.g., Mandeville Is. Farms* v. *American C. S. Co.*, 334 U.S. 219, 230, n. 9 (1948), where the Court lists a long series of its decisions rejecting the artificial manufacturing/distribution distinction of *Knight*. As this Court made clear in *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949): "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." The decision below thus would turn the clock back over half a century by reverting to repudiated concepts of what constitutes commerce. If allowed to stand, it would authorize the Virgin Islands and the other territories to regulate commerce with the States by enacting discriminatory taxes on the manufacturing of goods destined for shipment out of the territories. Indeed, the Virgin Islands continues to regulate the flow of wool to the United States by a tax quota act virtually identical to the Watch Production Quota Act. (See App. 39a; CAE 83b)

III.

The Court of Appeals sought to escape the specific limitation imposed by Congress on the powers of the Territorial Legislature by claiming that the prohibition contained in Section 36 (*i.e.*, Section 1406i of Title 48, U.S.C.)[12] of the Organic Act of 1936 was no longer in

[12] The last part of that Section of the Organic Act provides: "That no new export duties shall be levied in the Virgin Islands except by the Congress." (App. 87a)

effect because the 1954 revision of the Organic Act repealed "by implication" the entire 1936 Organic Act. This is plain error. First of all, the 1954 revision specifically provided that "*the provisions of Sections 1405-1405s, and 1405x-1406m of this title* [*Title* 48] . . . *shall continue in force and effect.*"[13] (Emphasis supplied) In view of this express saving provision covering section 1406i, the result reached by the court below based on the theory of implied repeal defies comprehension.[14]

Moreover, the legislative history of Congressional revisions of the organic legislation of the Virgin Islands shows that Congress refused to repeal Section 1406i despite the fact that the Circuit Judge who wrote the opinion below personally urged Congress to do so. In 1958 Congress considered further revision of the organic legislation of the Virgin Islands, including a provision that would expressly repeal the Organic Act of 1936. According to the House Report of the Committee on Interior & Insular Affairs, the proposed

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[13] The 1954 Organic Act, 48 U.S.C. § 1574(c), provides:

> The laws of the United States applicable to the Virgin Islands on July 22, 1954, included laws made applicable to the Virgin Islands by or pursuant to the provisions of Sections 1405-1405s, and *1405x-1406m of this title,* and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on July 22, 1954, shall, to the extent they are not inconsistent with this chapter, Sections 104 and 111 of Title 21, and Section 3350(c) of Title 26, *continue in force and effect* until otherwise provided by the Congress . . . . (emphasis added).

There were further amendments to the Organic Act in 1958 and 1963, but none of them affected the continued vitality of Section 1406i.

[14] Significantly, this line of argument, which the court below adopted as the ground of its decision, was neither urged nor suggested by respondents in this proceeding.

repeal was directed in particular to cover Section 36 (*i.e.*, Section 1406i of Title 48, U.S.C.) and to transfer jurisdiction over duties and customs matters from the U. S. Treasury Department to the Territorial Legislature. (App. 71a) The U. S. Treasury Department objected to this proposed repeal, pointing out that there would be no established agency available to enforce the Federal customs laws unless other appropriate legislation was enacted. (The letter from Treasury is reprinted in the appendix to the petition for rehearing at pp. 5a-8a)

On March 14, 1957, Circuit Judge Maris submitted a letter to the House Committee advocating the proposed repeal of the 1936 Organic Act. (App. 71a-73a) He stated: "The failure of the Revised Organic Act [of 1954] to repeal its predecessor of 1936 was an inadvertence which has caused confusion as to the present status of the organic law of the Territory. This section would rectify this error with an appropriate interim proviso with respect to Section 36 of the old act." (App. 73a) The Senate Report, however, relying on the objections raised by the Treasury Department, deleted the proposed repeal, and the legislation, as finally enacted by Congress, contained no provision repealing the Organic Act of 1936. (App. 74a-77a)

Obviously, the repeal-by-implication ground of the decision is wholly without merit and contrary to the facts of legislative history; and in no event is there to be found here that "clearest expression of Congressional intent" which this Court has held to be required before a territory can exercise legislative power such as that exercised by Virgin Islands under the Watch Production Quota Act. See *Mullaney* v. *Anderson, supra* at 420.

Contrary to the decision below (App. 12a-14a), such power cannot be implied from the fact that Congress in 1958 changed the legislative authority of the Virgin Islands from "all subjects of local application" to "all rightful subjects of legislation" to equate the Virgin Islands with Alaska and Hawaii. By this change Congress did not grant the Territorial Legislature any greater authority to regulate interstate commerce than that possessed by the States. See *Granville-Smith* v. *Granville-Smith, supra* at 16; *Mullaney* v. *Anderson, supra* at 420. Indeed, the Ninth Circuit's decision in *Mullaney* v. *Anderson* (affirmed by this Court) specifically ruled that the extension of legislative authority in the Alaskan organic act to "all rightful subjects of legislation" did not authorize the Territorial Legislature to impose burdens on commerce between the Territory and the State, stating: "But we cannot conceive that in granting legislative power to the Territorial Legislature it was intended that the power should exceed that possessed by the legislature of a State in dealing with commerce." (191 F.2d at 128)

IV.

As part of an overall plan to avoid a conflict with the watch industry on the mainland, the Governor of the Virgin Islands denied Virgo a tax exemption under the Industrial Incentive Act. That Act provides that companies meeting five specific requirements shall be entitled to certain tax exemptions. (33 V.I.C. §§ 4001, 4041, 4051, 4052) Although there is no dispute that Virgo met all of these five specific criteria, and despite the fact that other watch manufacturers in the Virgin Islands who had also met the five criteria were granted exemptions under the Act, Virgo's application for an exemption was held in abeyance for three years because, as Virgo was informed by the Virgin Islands

Industrial Incentive Board, "a controversy exists over our watch industry in regards to its effect on the mainland." (CAE 17b)[15] After the District Court twice ordered the Industrial Incentive Board to take appropriate action to determine whether Virgo was entitled to the same tax exemption accorded competing watch companies under the Act, the Board found that Virgo had met all the statutory criteria and recommended to the Governor that Virgo be granted an exemption. The Governor, however, denied Virgo an exemption, purportedly because it did "not require the stimulus of governmental assistance as provided for by the law." (CAE 37b-38b)

The Governor's action denying the exemption deprived Virgo of due process and equal protection under the laws. *Sioux City Bridge Company* v. *Dakota County,* 260 U.S. 441 (1923); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *International Business Machines Corporation* v. *United States,* 343 F.2d 914 (Ct. Cl. 1963), *cert. denied* 382 U.S. 1028 (1966).

The denial was not made for any statutory reasons. The Act sets forth the criteria under which a company's qualification must be determined. *Vitex Manufacturing Co.* v. *Government of Virgin Islands,* 351 F.2d 313 (3d Cir. 1965). Nowhere does the Act re-

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[15] Respondents stated in their brief before the District Court:

> *In the hope of discouraging any further Congressional action* to amend Headnote 3(a), *the Governor* of the Virgin Islands undertook to preserve the economic interest of the Virgin Islands in the preservation of the watch industry by two measures: (1) *the withholding of further tax exemptions for watch firms, particularly the freedom from the equivalent of the Federal Income Tax;* (2) the appointment, on May 9, 1965, of a Special Committee to make recommendations as to what steps should be taken to maintain the insular industry without undue adverse effects on mainland production. (CA 27b-28b) (emphasis supplied)

quire a showing by an applicant that its operations "require the stimulus of governmental assistance." Moreover, the record demonstrates that the decision to deny Virgo an exemption was based purely on political considerations, including pressure on the Governor by his superiors in the Department of Interior resulting from the "controversy" which existed with regard to the watch industry on the mainland. The Governor's action thus raises an important constitutional question of whether territorial governments are, as are other governmental bodies, required to base administrative determinations upon statutory standards, or whether they may make such decisions on an *ad hoc* basis in order to avoid "political" controversies and to discourage Congressional enactment of legislation of which they disapprove. *Morgan* v. *United States,* 298 U.S. 468 (1936); *United States* v. *Shaughnessy,* 347 U.S. 260 (1954); *Harmon* v. *Brucker,* 355 U.S. 579 (1958).

V.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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